

OGC Has Reviewed

Washington, D.C. 20505

8 February 1979

MEMORANDUM FOR: Larry Garrett, Esq.
 Office of Government Ethics
 Office of Personnel Management

STAT FROM :
 Office of General Counsel

SUBJECT : Ethics in Government Act of 1978:
 Post Employment Restrictions

1. This is in response to the memorandum of 17 January 1979 from the Director, Office of Government Ethics, requesting our comments on the post-employment provisions of the "Ethics in Government Act of 1978." These comments address the several areas that you and I discussed last week, and offer several hypothetical cases to illustrate our interest in further clarification.

2. Under the Act former officials are prohibited from making appearances before the Government on certain matters on which they worked while government employees. The anticipated regulations should clarify the extent to which the Act precludes a meeting between such officials and representatives of the Government when the meeting is held at, for example, a contractor's place of business, or before a neutral third party, and is not technically an appearance before the Government in the sense that a person appears before a regulatory agency to apply for a license.

Example. A government employee who has assisted in establishing requirements for a contract in his area of expertise leaves government employment to accept a position with the agency contractor whose bid was accepted. At a meeting at the contractor's plant to discuss the project, there is a dispute as to what the contract actually requires. The employee is called upon to support the contractor's position against the Government's representative.

3. While, in this hypothetical, the employee's participation might be prohibited as an attempt to influence the Government, the facts might be altered slightly so that there is no actual dispute involved. In such a situation, the employee could be called upon at the joint request of the Government and the contractor to interpret the contract requirements, and to advise all parties of how the research ought to be approached. Is this prohibited as an attempt to influence?

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Example. Employee returns to the university from which he took a leave-of-absence to work for the government. While so employed, he had made recommendations on the types of work that might best be performed by outside contractors. Back at the university (or think-tank) once again, he is asked about the chances for securing a government contract. May he help submit the bid based upon what he knows from his government experience?

4. The question of whether the Act applies routinely arises in situations, including those above, where the work to be performed by the former employees inures to the mutual benefit of the Government and its contractor. The difficulty lies in attempting to determine whether the former employee is representing anyone other than the United States. While the statute clearly contemplates restrictions involving adversary relationships--such as appearances before regulatory agencies--it is unclear to what extent being rehired by the Government, whether directly or as a contractor's employee, tends to eliminate potential for conflicts. When a former employee is rehired as a consultant or independent contractor there is no allegiance owed to anyone but the employer, the United States, although in a technical sense that person is looking out for himself. However, when the former employee performs for a third party the very tasks he could have performed as an independent contractor, it is quite clear that the U.S. may not have that person's undivided loyalty. Yet, in both cases, the work is to be completed on the Government's behalf.

Example 1. Former employee who established requirements for a contract now forms a one-man corporation to submit a bid for the contract, and is awarded the contract because of his own expertise. Is this representing someone (the corporation), other than the U.S.?

Example 2. Same employee instead accepts a job as an employee with a research corporation that either submits a bid--with that employee's participation--and is subsequently awarded the contract or has been awarded the contract (perhaps upon his recommendation) prior to his employment. Because of his expertise, the former government employee is assigned to complete the study, or merely assists in completing the study, that is to be presented before the Government upon its completion.

While it is clear that these hypotheticals involve matters that may be within the scope of the statute, the fact that the services provide invaluable assistance to the mission of a U.S. Government agency might very well preclude any conflict.

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The regulations involved with work performed on behalf of the Government, and note any disparate treatment arising from the person's status, whether it be as an independent contractor or consultant, a member of a partnership, the founding officer in a one or two-man corporation, or an employee of a major corporation that has solicited a government contract.

5. The phrase "particular matter involving a specific party or parties" suggests that a rather narrow interpretation should be placed upon the lifetime and two-year bans, consistent also with the construction placed upon criminal laws, generally. In the scientific world, where a project might last several years, the terms of the contract could be modified several times before the project is completed. In addition, an initial project might involve several different technical disciplines that are only marginally related. The regulations should attempt to offer some guidance on the scope of the restriction.

Example 1. Former government contracting officer for project XX is considering employment with the contractor on that project and would be expected to:

- a. assist in a dispute involving the terms of the contract;
- b. assist in a modification to the contract that will save the Government and/or the contractor money;
- c. negotiate a contract that he recognizes will be a logical follow-on to the initial contract.

Example 2. Officer who for the U.S. negotiated a contract with company X for research of foreign economic conditions accepts position with company X, not as a contracting officer but:

- a. to do the actual research;
- b. as a security officer overseeing the contractor's compliance with the security provisions of the contract he negotiated;
- c. in any other capacity involving the completion of that contract to the Government's satisfaction.

Example 3. Official responsible for the security of project XX at the contractor's plant leaves Government service to become the security officer for the contractor on that project.

Example 4. Government's technical representative on project XX accepts position in any capacity with the contractor to assist on the same project, e.g.

- a. to oversee technical compliance;
- b. to perform functions he would be monitoring if he were still with the U.S., and which were in fact being performed by the person he replaced.

As is evidenced by the foregoing examples, not only contracting officers and their technical representatives but also security officers and other support personnel not ordinarily thought to fall within problem areas might be involved in potential conflicts. Presumably, however, the narrow construction of the Act will continue to preclude prosecutions for performance merely of technical work of the nature that is typically within the responsibility of the security or other administrative type officer. Technical work, moreover, might also include work typically performed by salesmen who attempt to utilize their Government contacts for financial gain, yet without any intent at coercion or undue influence.

Example. Former librarian or historian whose U.S. duties involved buying X journal each week takes a job with the bookseller to sell the same publication to his replacement.

6. Moreover, the regulations should also clarify the extent to which there will be restrictions placed not only on the officials involved in existing government contracts but also on those who are not. For example, many agencies utilize the services of outside specialists--university professors, consultants, economic forecasters--who serve the Government for two or three years as employees and return to the private sector. Such individuals thereafter might be called upon occasionally to conduct certain research for the Government on matters that were within their official responsibility before the termination of their official duties.

Example 1. A former weapons analyst involved in, for example, SALT verification, returns, after agency X rejects his conclusions, to university/think-tank to continue his research. Thereafter, another agency of the U.S. attempts to utilize the think-tank to oppose the position of agency X. May the analyst assist as an employee of the university/think-tank?

Example 2. Political analyst whose area of expertise is Soviet propaganda leaves Government service and:

- a. writes an article about Soviet propaganda efforts;
- b. accepts a position with the Brookings Institute, which publishes a report on Soviet propaganda;
- c. accepts a position with a lobbyist who is involved in a case where Soviet propaganda is an issue.

Example 3. Former intelligence analyst who monitored anticipated oil deal between company X and country A leaves Government service to work on that deal for the oil company (or the country) involved.

While perhaps this example involves a situation where the U.S. does not have a direct and substantial interest as intended by the Act, if the facts were changed so that the former official prepares appropriate environmental impact statements for the EPA, it certainly raises questions of whether U.S. interests might include matters solely of informational/intelligence value, which the regulations should make clear are not particular matters.

Example. Former official, expert on country X economic matters, including T.V. exports, represents country X in efforts to export T.V. sets to the U.S. including dealing with such departments and agencies as International Trade Commission, Office of the Special Representation for Trade Negotiations, Treasury Department, Commerce Department, etc. Any conflict of interests?

7. Several other questions arise from the language of the Act and could be addressed in the regulations. First, the regulations should clarify how far down the chain of command an official may be and still have significant decision-making or supervisory responsibilities so as to be precluded from assisting others (§ 207(b)(ii)) or contacting their former agencies (§ 207(c)). Some officials, for example, may not take official action without case-by-case approval of a reviewing official.

8. Second, the regulations should address the waiver permitted for communications involving scientific, technological, or other technical disciplines and should provide guidance on the extent to which a waiver may be granted for former officials involved in economics, political science, or even patent law. While this Agency will attempt to determine what officials ought to be designated under the Act, we have not yet reached any conclusions. However, it would be useful for the waiver provisions to focus not only on the area of expertise but also on how the information is provided, e.g. individual consultant vs. contractor's employee; mutually beneficial vs. adversary relationship; gratuitous vs. compensated communications.

9. Third, the Act provides that a special government employee who serves for less than sixty days in a calendar year is not subject to the restrictions of § 207(c). Since, however, a special government employee is defined in § 202 as one who works not more than 130 days, such officials seem to be exempt from the restriction if they work for 59 days at the end of one year and 59 days at the beginning of the next. Is this a correct interpretation?

10. Finally, the regulations should address two matters that are of particular concern to legal staffs. First, to what extent is an agency expected to determine, prior to awarding a contract, whether a former employee might be involved in a possible conflict of interests? We would strongly urge that the regulations make clear that an agency does not have to decline to award a contract on the basis that a conflict might result. Any restriction must rest lie solely on the individual and possibly, tangentially, on the current employer. In the past this Agency has made such determinations beforehand to avoid later flap potential; however, some former employees have objected to the Agency's involvement. While we may well decide to continue that practice, the regulations should make it clear that the ultimate burden lies on the employee who is or has left government service. Second, you might give some guidance to legal staffs on the possible liability that government attorneys face in giving advice to employees who intend to accept post-employment positions, or upon agencies, generally, for unnecessarily declining to permit an employee's new boss to utilize that employee on a Government project. Are there due process considerations involved?

11. This memorandum has attempted to focus on typical concerns of Agency employees. Naturally, each situation that arises will be considered on a case-by-case basis; however, guidance from the Ethics Office will be most useful in helping employees avoid conflicts before they occur. Therefore, I thank you for the opportunity to offer these few remarks. These are some of our initial thoughts. As we work with this, we may have further questions that we may ask you to address. If you have any questions or comments, please do not hesitate to contact me at

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